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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-239

LOUIS SMITH,
Defendant-Petitioner,

vs.

STATE OF OHIO,
Plaintiff-Respondent.

REPLY BRIEF OF PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Brief of the petitioner correctly cites the opinions and judgments below.

JURISDICTIONAL STATEMENT

The petitioner's Petition for a Writ of Certiorari is from a judgment of the Supreme Court of State of Ohio, entered on or about May 18, 1973, in which the Supreme Court of Ohio denied the petitioner leave to appeal. It is the belief of the respondent, State of Ohio, that the petitioner's conviction under the laws of the State of Ohio was consistent with the United States Constitution and its Amendments thereto.

QUESTIONS PRESENTED

Is the petitioner's constitutional protection against unreasonable search and seizure under the Fourth and Fourteenth amendments of the United States Constitution violated when a police officer; who receives a radio run from his dispatcher to a specific address with the instructions that at the address a man with a gun will be found; and when the police officer observes a bulge in the man's coat and reaches toward the bulge the man pushes him down the steps and the police officer thereafter grabs for the defendant-petitioner and a scuffle ensues which starts in the hallway and goes into the apartment of the defendant and is finally concluded in the hallway, at which time the police officer finds the gun where the bulge was?

STATEMENT OF THE CASE

On February 21, 1971, at approximately 5 P.M., Cincinnati Police officers responded to a radio run "man with a gun at 710 N. Crescent Avenue". A cruiser responded to the side street that runs along the side of the apartment building located at 710 N. Crescent Avenue, near the rear of the building. One of the officers stated he heard loud noises inside the rear of the building. The officer and his partner entered the back door which lead to a hallway leading to all apartments in the building which door was not locked; went up the common stair case for all the apartments on the second floor, to the second floor where they heard the loud voices coming from. On the second floor hallway landing the first officer encountered the defendant and his wife. The officer asked if they had called the police and that he was responding to a radio run. The defendant and his wife said that they had not called the police and that the officer's services were not needed.

defendant turned toward his apartment door and officer observed a bulge under his coat. The officer bbed for the defendant and the defendant pushed the er down the steps in the hall. (R-237). The officer wered and grabbed at the defendant and had an alter- on with said defendant starting in the hallway outside defendant's apartment and thereafter going inside the ndant's apartment and back outside on the hall land-

The officer, after the defendant was subdued and dcuffed, patted down the defendant and from the de of his jacket recovered a loaded 32 caliber revolver a holster which he had previously observed as being ulge under the coat.

Defendant was arrested for Carrying a Concealed Fire- n, Assault and Battery, and Disorderly Conduct. The ault and Battery charge and the Disorderly Conduct rge were misdemeanors and were tried in the Municipal rt.

The case for Carrying a Concealed Firearm was bound r to the Grand Jury and the Grand Jury indicted defendant. The case was subsequently tried to a jury r a Motion to Suppress was overruled. The Motion Suppress was heard on April 14, 1972 and overruled. e jury found the defendant guilty as charged in the ictment on April 21, 1972. Defendant was sentenced a period of not less than one nor more than three rs in the Ohio Penitentiary as provided by law. A ely Notice of Appeal was filed to the Court of Appeals the First Appellate District and the Court of Appeals the First Appellate District of Ohio set bond for the endant-appellant pending the perfection of his appeal n the Common Pleas Court judgment. Defendant- ellant has been on bond ever since the setting of the nd by the Court of Appeals of the First Appellate Dis-

trict through stays of execution granted by other Ohio Courts and this Court.

The Court of Appeals of the First Appellate District after having the record filed and having briefs filed by both plaintiff and defendant and after hearing arguments of counsel issued its opinion and affirmed the judgment of the Court of Common Pleas of the State of Ohio. Defendant-petitioner thereafter filed a Motion for Leave to Appeal to the Supreme Court of Ohio and the Supreme Court denied jurisdiction in this matter. Thereafter, defendant-appellant filed his Petition for Writ of Certiorari to this Court.

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED

Counsel for the defendant-petitioner in his over-exuberance in his representation of the defendant-petitioner has put words into his statement of facts and his reasoning which are not supported by the evidence presented in the course of the trial. It is respectfully submitted in this case that there are no Constitutional issues involved and that the officer had a legal right to make a search for a weapon to protect his person as well as having more than a sufficient amount of probable cause under all the facts and circumstances as brought forth in the trial upon which to arrest the defendant in this case.

ISSUE

IS THE PETITIONER'S CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A POLICE OFFICER, WHO RECEIVES A RADIO RUN FROM HIS DISPATCHER TO A SPECIFIC ADDRESS WITH THE INSTRUCTIONS THAT AT THE ADDRESS A MAN WITH A GUN WILL BE FOUND; AND WHEN THE POLICE OFFICER OBSERVES A BULGE IN THE MAN'S COAT AND REACHES TOWARD THE BULGE THE MAN PUSHES HIM DOWN THE STEPS AND THE POLICE OFFICER THEREAFTER GRABS FOR THE DEFENDANT-PETITIONER AND A SCUFFLE ENSUES WHICH STARTS IN THE HALLWAY AND GOES INTO THE APARTMENT OF THE DEFENDANT AND IS FINALLY CONCLUDED IN THE HALLWAY AT WHICH TIME THE POLICE OFFICER FINDS THE GUN WHERE THE BULGE WAS?

ARGUMENT ON ISSUE

With due respect to the generalized statements of counsel r the defendant-petitioner; many of the things which he ys are either a sloughing over of important relevant idence produced at the time of the trial; or, in some ses, are figments of counsel's imagination. This is pecially so where he says a polite conversation took place tween the parties.

It is our belief that the search and seizure of the weapon om the defendant-petitioner in these proceedings are

clearly permissible on either one of two grounds in respect to recent pronouncements of this Court.

In simple language, the police officers received from their radio station a broadcast to proceed to a certain address where there was a man with a gun. The officers proceeded to the address and went into a public hall leading to all apartments and there heard loud noises which can be inferred to be arguments coming from the upstairs landing. The officers proceeded through the common hallway used by all tenants to the top of the second floor landing where they came into contact with the defendant-petitioner and his wife. Defendant-petitioner indicated that he had not called the police and while the officer was still interrogating him the defendant turned to go toward his apartment. At the time that the defendant turned to go toward his apartment and at a point in which the investigation had not been completed the officer saw a bulge in the defendant's pocket which he assumed to be a weapon. The officer grabbed for the defendant and the defendant assaulted the officer, pushing him down the stairs as evidenced by the record. The officer then got up and grabbed at the defendant and an altercation ensued which started in the hallway and went into the defendant-petitioner's apartment and then back out into the hallway. When the officer finally was able to subdue the defendant he was able to go to that point in the defendant-petitioner's pocket and remove a loaded gun from the place where he had observed a bulge.

It is our belief that either under the authority of *Terry* v. *State*, as reported in 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d. 889 or in the case of *Adams* v. *Williams* as reported in 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d. 612, that the search by the officer and the removal of the weapon was valid.

In the case of *Terry* v. *State*, supra, at page 1883, of the U.S. Report edition, this Court stated:

> "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. Beck v. State of Ohio, 379 U.S. 89 at 91, 85 S. Ct. 223 at 226, 13 L. Ed. 2d 142 (1964); Brinegar v. United States, 338 U.S. 160 at 174 to 176, 69 S. Ct. 1302 at 1311, 93 L. Ed. 1879 (1949); Stacey v. Emery, 97 U.S. 642 at 645, 24 L. Ed. 1035 (1878)."

Now, lets take the specifics of the case currently before the Court. The officer had a police radio run to report to a certain address and at that address there was a man with a gun. The officer went into the public common hallway in the apartment building in question and he heard loud noises emanating from the second floor. The officer went to the second floor and defendant-petitioner stated that he had not called the police and abruptly turned to leave the officer going toward his apartment door when the officer saw a bulge in his pocket. When the officer endeavored to stop the defendant from leaving the defendant-petitioner pushed the officer down the stairs.

We respectfully submit that not only was there more than a sufficient amount of evidence upon which the officer reasonably had suspicions that the defendant was carrying the gun by virtue of all the surrounding circumstances and facts in light of what he knew at that particular time;

but, it is our humble opinion that this even goes to the fact of showing actually probable cause for making the arrest in question which was for Assault and Battery on the police officer, disorderly conduct and Carrying Concealed Weapons which latter charge is the only charge on appeal to this Court.

As this Court held in the case of *Adams* v. *Williams*, supra, at page 616 of the Law Edition Report, this Court stated:

> "In Terry this Court recognized that 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.' 392 US, at 22, 20 L Ed 2d at 906. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. See id., at 23, 20 L. Ed 2d at 907. *A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.* Id., at 21-22, 20 L Ed 2d at 905, 906; see Gaines v. Craven, 448 F 2d 1236 (CA 9 1971); United States v. Unverzagt, 424 F 2d 396 (CA 8 1970).
>
> The Court recognized in Terry *that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. 'When an officer is justified in believing that the individual whose suspicious be-*

havior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons. Id., at 24, 20 L Ed 2d at 908." (Emphasis ours.)

Now applying the two cases in question as we indicated it is our opinion that not only did the officer have a right to search for a weapon based on the information received by him supported by facts which he actually saw and observed first hand corroborating some of the other information that he received; but, it is our belief that there was more than a sufficient amount of evidence upon which the officer had probable cause to make an arrest. First of all, as previously indicated, the officer received a radio run from the police radio to proceed to a certain address and on that premises there was a man with a gun. The officer entered into the public common hallway of the apartment building in question where he heard loud noises emanating from the second floor. The officer proceeded to the top of the second floor landing where he encountered the defendant-petitioner and his wife. The officer proceeded to start asking questions whereupon defendant-petitioner indicated that he had not called the police and abruptly turned to go toward his apartment. When the defendant-petitioner turned to go to the apartment the officer saw a bulge in his pocket. When the officer reached toward the defendant-petitioner, defendant-petitioner assaulted him by pushing him down the staircase. It is our humble opinion that not only was there sufficient grounds upon which the officer could make the search in question for the protection of himself and others based on the evidence and information that he had received and on what he had actually observed; but, in

our opinion there was more than a sufficient amount of evidence to constitute probable cause.

Secondly, when the defendant pushed the officer down the stairs (R-237) the arrest for Assault and Battery on the police officer was warranted and it has always been the law that an officer may pat down and search an accused for weapons when an arrest has been made.

CONCLUSION

In conclusion, it is respectfully submitted that based on the record as presented in the course of the trial that there was not an unlawful search and seizure involved in this matter and that the officer had not only probable cause to make an arrest; but, he also had the right to protect himself and others by searching for the weapon in question which was found at exactly the spot where the bulge was indicated for the protection of himself and others in the immediate vicinity. Accordingly, we respectfully request that the Petition for Writ of Certiorari in this case be denied.

Respectfully submitted,

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